No. 84-634

In The
Supreme Court of the United States
October Term, 1984

CHEVRON U.S.A., Inc., et al.,

Petitioners,

vs.

JAY S. HAMMOND, GOVERNOR OF THE STATE OF ALASKA, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

NORMAN C. GORSUCH
ATTORNEY GENERAL

DOUGLAS K. MERTZ
Assistant Attorney General
State of Alaska
Department of Law
Pouch K, State Capitol
Juneau, Alaska 99811
(907) 465-3600

Counsel for State of Alaska Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED

May the State of Alaska, consistent with the Supremacy Clause, prohibit oil tankers from discharging oil-contaminated ballast water into state waters, when the U.S. Coast Guard's regulations do not grant a right to such a discharge and the Clean Water Act affirmatively allows states to impose stricter discharge requirements than those of the federal government?

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STATEMENT OF THE CASE

In 1976 the Alaska Legislature passed a statutory prohibition on the discharge of ballast water from cargo tanks of oil tankers into state waters. This legislation was prompted by evidence that ballast water discharged from cargo tanks, i.e., tanks which contain oil for a portion of a voyage, always contain residual oil, and that even min-

ute amounts of oil harm larval crustaceans important to Alaska's fishing economy.[1] (CR 141)[2]

In 1977 petitioner Chevron U.S.A. filed suit on the issue in the instant case and others. The U.S. District Court issued final rulings on a variety of issues in the case in 1979 and 1981; in 1981, the present respondents appealed the District Court's adverse ruling on the instant issue to the U.S. Court of Appeals for the Ninth Circuit. On February 3, 1984, the Court of Appeals reversed, ruling for the State of Alaska defendants. After receiving an extension of time until June 2, 1984, Chevron U.S.A. lodged a Petition for Writ of Certiorari with this Court on June 4, 1984; the Petition was rejected as untimely. On June 18, 1984, this Court denied Chevron's motion for leave to file an untimely petition for writ of certiorari. (Appendix B). Simultaneously, however, Chevron had returned to the Court of Appeals with a motion to allow a late petition for rehearing; it conceded in its moving papers that its motivation was to secure a new mandate from the Court of Appeals, thus, it believed, starting over its time for petitioning for certiorari in the Supreme Court.[3] The Court of Appeals allowed the untimely motion for rehearing to be filed, then denied the petition

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[1] The statute, Alaska Statute 46.03.750, was amended in 1980, following the District Court decision, to give the tanker industry more discretion in deciding appropriate methods of complying with the no-discharge requirement. See chapter 116, 1980 Session Laws of Alaska.

[2] Record citations are to the District Court's Clerk's Record prepared for the Court of Appeals.

[3] Supreme Court Rule 20.4 states that a "timely filed" petition for rehearing starts the time limit for petitioning for cer-

(Continued on next page)

on August 9, 1984. The renewed Petition for Writ of Certiorari was then filed and served on respondents on October 22, 1984.[4]

Chevron's basic claim below was that the Alaska statute was preempted by the Ports and Waterways Safety Act (PWSA), P.L. 92-340, 46 U.S.C. § 391a, because the state standard for discharge of contaminated ballast water is stricter than that in Coast Guard regulations promulgated under the PWSA.[5]

The Court of Appeals' decision noted that neither the PWSA nor the Coast Guard regulations contain an explicit

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(Continued from previous page)

tiorari anew. It is unclear whether the time period is also enlarged when, as here, the petition for rehearing was *not* timely but was nonetheless allowed to be filed by the Court of Appeals.

[4] The renewed Petition for Certiorari is not limited to a request for review of the new issues raised in the Motion for Rehearing to the Court of Appeals; it requests review of all the issues argued in the first Petition which this court refused to receive.

[5] The Coast Guard regulations, at 33 C.F.R. §§ 157.29, 157.37, allow tankers to discharge "oily" ballast beyond fifty miles from land, but prohibit discharging all except so-called "clean ballast" (ballast containing low levels of oil) within fifty miles. The Alaska statute effectively prohibits discharge of any ballast containing oil within the 3-mile state waters.

Chevron repeatedly uses the phrase "clean ballast" in its petition as if it refers to oil-free ballast; this is misleading. In fact, "clean ballast" is a term used in the Coast Guard regulation to indicate ballast which merely contains less contaminant than so-called "dirty ballast." All parties agree that ballast water from cargo tanks—whether "clean" or "dirty"—always contains oil. Chevron also states, as if it were fact, that the Coast Guard regulations expressly permit discharge of contaminated ballast in state waters; this is one of the main legal issues, and the court of appeals resolved it against Chevron.

reference to an intent to preempt (as Chevron conceded below). It also noted that it is possible for every tanker to comply with the requirement without physical alteration and without being subjected to conflicting standards in other jurisdictions.[6] Finally, it also noted that the Clean Water Act, passed in the same Congress as the PWSA, affirmatively grants states the right to impose stricter discharge requirements than the federal government in state waters.[7]

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REASONS FOR DENYING THE WRIT

Summary of Argument

A writ of certiorari should be denied in this case because it presents no issues important enough to warrant the Court's review. Petitioners concede that it will affect only one small and aging vessel, operating in the waters of one state. No other cases in other jurisdictions have complained of similar laws, and there are no conflicting lower court decisions. No disruption of the tanker industry has occurred and petitioners can show no likelihood of any. Most importantly, the tanker industry itself is moving voluntarily to the cleaner and more efficient operation of

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[6] Chevron had argued that Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), contains a finding that Congress intended the PWSA to preempt the field of tanker deballasting. But the Court of Appeals ruled that in *Ray* this Court affirmed the right of states to impose non-discriminatory environmental operational requirements on tankers so long as they were not design and construction requirements. 435 U.S. at 164.

[7] There are two "non-preemption" provisions in the Clean Water Act, at 33 U.S.C. § 1321(o)(2) and 33 U.S.C. § 1370.

vessels required by the statute at issue, so the controversy is disappearing and hardly merits review at this level.

I. The Impact Of This Case Is Minor And Neither National In Scope Nor Recurring.

Rule 19 of the Supreme Court Rules states that certiorari will be granted only when the question is "important" or "of substance", *Rice v. Sioux City Cemetery,* 349 U.S. 70, 74 (1955) or is of a recurring nature, *Baggett v. Bullit,* 377 U.S. 360, 366 (1964). This case has little importance for anyone other than the litigants and even then will have little long-term impact for petitioners. It deals with a problem which is diminishing, not recurring.

A. Only one vessel is affected by his ruling.

Alaska law prohibits discharge of oil-contaminated tanker ballast water into state waters. Tanker owners have a variety of means available for compliance, including use of segregated ballast tanks, use of shore-based deballasting facilities, use of oil barges instead of tankers, and use of stationary barges for receiving tanker oily ballast for later transfer to an onshore deballasting facility. Since passage of the statute, every tanker used in Alaskan waters except one has come into compliance through one of the above methods. The single exception is Chevron's *Alaska Standard,* a small aging vessel which transports a portion of the oil used in various coastal communities. In fact, the *Alaska Standard* discharges polluted ballast in only some of the ports it visits; it is able to comply fully in other ports by using onshore reception facilities. (CR 141) Thus, the practical effect of the ruling below is minimal, i.e., requiring Chevron to modify its operation of one small vessel in a few ports so as to join

the rest of the industry, including its competitors, in no longer discharging oil into state waters.

B. There are no broader ramifications of the ruling below.

Chevron contends that the ruling below "threatens to disrupt the tanker industry"; they offer no indication of how it could do so, and the record contains no such evidence. Two points are clear: The tanker industry trend toward segregated ballast tanks and on-shore deballasting facilities is world-wide and will not be accelerated by requiring the *Alaska Standard* to comply with Alaska's laws. And secondly, the fear that the ruling below will disrupt the industry by causing a proliferation of varying state discharge standards is illusory: under the Clean Water Act every state has its own standards for discharge of scores of pollutants, from sewage to garbage to oil, from vessels into state waters. These varying standards have been upheld numerous times (e.g., *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973)) and the tanker industry has never been disrupted by having to comply with them.[8]

In any case in the eight years since Alaska passed its law, no other state has duplicated it, and not a single other lawsuit regarding preemptive effect of the PWSA has

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[8] Of course if varying state standards required design changes or were so conflicting that compliance were physically impossible, preemption would result, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). But Alaska's law requires no physical alteration of vessels and is compatible with federal law, so under *Ray*, no preemption problem exists. That there have been no conflicting requirements or disruptions of the industry is shown by the industry's overwhelming compliance with Alaska's law.

been filed in federal courts. This is clearly not a matter of national imoprtance, and given the lack of similar statutes or cases, it can hardly be said to be a recurring problem.

C. Alaska's law will not hinder Coast Guard anti-pollution efforts.

Chevron contends that this case should be reviewed because Alaska's statute somehow frustrates the Coast Guard's regulation of tanker pollution. In fact as the Court of Appeals found Alaska's statute does not conflict with or frustrate federal requirements. Chevron's theory depends on the assumption that the Coast Guard grants an affirmative right to pollute, where Alaska prohibits it; and that failure to allow tankers to pollute state waters somehow upsets and frustrates a grand Coast Guard scheme to reduce pollution. Neither is true.

The Coast Guard regulations set out two different sets of restrictions on discharge of contaminated ballast within fifty miles of land the regulations prohibit all discharges of oil-contaminated ballast except that with oil levels too low to create a visible sheen, sludge, or emulsion; beyond fifty miles tankers may discharge even more contaminated ballast. Chevron reads this as according tankers the positive right to discharge low-level contaminated ballast within the fifty-mile zone, which would conflict with the state's prohibition on discharges within the 3-mile zone of state waters. To make this argument, Chevron must posit that the PWSA, whose purpose they concede is to protect the marine environment, has its purpose frustrated by a state statute which provides an even greater measure of protection to the environment. In fact,

this is a simple case of a set of federal restrictions vis-a-vis a set of state regulations which go beyond the federal regulations in the same direction; the state regulations do not frustrate the purpose of the federal regulations, they advance it. It is not logical, in view of the PWSA's purpose, to theorize that it intended to accord a positive right to pollute, nor is there any support in the Act for that theory.

Likewise there is no support for the theory that Alaska's law will somehow frustrate a grand Coast Guard comprehensive plan to reduce pollution. The Coast Guard may have arrived at a different judgment than Alaska's on how stringent the restrictions on pollution ought to be, but there is no evidence that the Coast Guard affirmatively desires tankers to discharge oil in state waters. And there is no evidence that the Coast Guard's overall plan to reduce tanker pollution will be frustrated if tankers are banned from polluting state waters.[9]

D. Alaska's law will not hinder international efforts against pollution.

Chevron theorizes that Alaska's law, which operates only within the 3-mile zone, will somehow hinder efforts to reach international agreements on pollution control.

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[9] Chevron asserts in its Petition (p. 22) that Alaska's prohibition on contaminated ballast discharge "renders purposeless" equipment required by the Coast Guard. This is simply untrue. Alaska's law applies only in the 3-mile state waters; beyond three miles, to the 50-mile limit set by the Coast Guard, the federal requirements for onboard equipment remain just as necessary and purposeful as their authors intended. Moreover, some of the required equipment, i.e., the above-water piping, is utilized every time a vessel uses onshore deballasting facilities.

In fact, this legislation is irrelevant to international agreements and will have no effect on international relations. The international treaty-making efforts cited by Chevron relate solely to pollutant discharges on the high seas; as the court below found, none of the treaties to which the U.S. is a signatory or is considering joining affects operations in territorial waters (see, e.g., the 1978 MARPOL Protocol). Indeed, the U.S. has consistently insisted, in negotiating international agreements on pollution, on the right to apply different standards in territorial waters; the Ports and Waterways Safety Act, at 46 U.S.C. § 391a(6), explicitly authorizes regulations exceeding international standards.

In point of fact, Congress, in the PWSA and elsewhere, even when accepting international standards on the high seas, has always insisted on the right to apply its own domestic standards to pollution of coastal waters. By using the Clean Water Act as the primary device for setting pollutant discharge standards in coastal waters, Congress has made clear that allowing states to set their own reasonable standards is not an impermissible interference with international treaty-making. Chevron has offered no credible evidence that any such interference actually occurs, and there is no support for the proposition in the record.

II. The Controversy Will Soon Become Moot.

A. The industry is moving toward elimination of the type of vessel at issue here.

Both federal legislation and international agreements have resulted in a clear tanker industry trend in the last decade. Most new tankers are built with segregated bal-

last tanks, eliminating the need for putting ballast in cargo tanks and thus contaminating it; more on-shore deballasting and oil/water separating facilities are being built; small tankers are being replaced by barges on coastal hauls, such as that of the *Alaska Standard*.[10] With increasing environmental regulation and improving technology, new cleaner vessels are fast replacing those which discharge oil-contaminated ballast. The Alaska market is a case in point: Since initial passage of the statute at issue here, in 1976, the entire fleet serving Alaska has switched to onshore deballasting or been converted to segregated tanks. When the aging *Alaska Standard* retires (it was built in 1959), the entire fleet will have come into compliance with Alaska's pollution standards by the ordinary process of modernization over time. Thus there is no cause for Supreme Court intervention, since the mere passage of time will moot the controversy.

B. Congress is considering legislation which would moot the ruling here.

Recently Congress has been considering legislation which would revamp the national approach to oil spills, including preemption of some or all state oil spill legislation. During the current session the House Merchant Marine Committee passed out a version of the Comprehensive Oil Pollution Liability and Compensation Act which would preempt state oil spill liability laws, most

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10 Fuel barges supply much of the oil product delivered in the area served by the *Alaska Standard* and other vessels. Contrary to Chevron's assertion, the District Court record shows evidence exists that barges are in fact environmentally safer than tankers, since barges spill less oil per accident than tankers. Chevron itself uses barges as well as tankers.

likely including the one at issue here.[11] Although Congress will likely take no further action this year, the proposal for a national preemptive oil spill law will doubtless be considered again early in the new Congress. The Administration supported the preemption provisions of the proposed Act this year, so the possibility of mootness through new legislation must be considered very real.

III. There Are No Conflicting Decisions, And Resolution Can Wait Until Conflict Arises.

Chevron states that this Court should review the ruling below because it threatens to disrupt the tanker industry. As we note above, such "disruption" is almost totally illusory, since only one aging vessel would be effected. Chevron also asserts the "possibility" of similar laws in other states, with attendant dire consequences. In the years since Alaska's law was passed in 1976, no such laws have passed and no such disruption has occurred.[12] In fact, the consequences of such restrictions on the industry are so minor that there are no other cases on this or related controversies, and no other court of appeals decisions, much less conflicting ones. It is apparent

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11 That bill, HR 3278, was eventually merged into HR 5640, the so-called oil spill "Superfund" bill; HR 5640 has a narrower preemption provision which would not affect the Alaska statute at issue here. It is likely that both provisions will be reintroduced in the next Congress.

12 In fact every state already has its own standards for discharge of pollutants into state waters, promulgated under the Clean Water Act; no disruption of the industry has resulted. We also note that in 1980, following the District Court decision, the Alaska statute at issue here was liberalized to give the industry free scope to decide on alternatives to discharge of contaminated ballast; the earlier version required that it be transferred to an on-shore deballasting facility.

that this is not a controversy which is growing or which needs immediate resolution at the highest federal level: if in fact other states ever follow suit, and if in fact the tanker industry became discommoded by such laws, legal challenges would arise. There is nothing in the record to indicate that the national interest cannot wait for other cases to arise, to be either resolved at the court of appeals level, or by this Court if a conflict arises. But for now, there are no other cases and, therefore, no conflict among circuits, and there is nothing to indicate a need for the Supreme Court to resolve the questions. At the same time *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), has not engendered new questions on the application of the PWSA; the court of appeals clearly followed *Ray* fully, considering each element of that decision as it applied here. Given the lack of other cases on the same statute, *Ray* hardly needs to be reexamined after this short period.

IV. Review Of The Ruling Below Would Require A Detailed Factual Inquiry.

The ruling below required a detailed study of the legislative history and language of both the PWSA and the Clean Water Act, as well as a particularized inquiry into a number of detailed factual questions which are unique to this case. Chevron's position rests in part on the theory that Alaska's statute will require widespread changes in the tanker industry, including physical alterations of vessels; it also theorizes that Alaska's prohibition upsets carefully balanced regulations taking into account vessel design, available facilities, and the economics of the oil transportation business. To review the merits of these assertions, the lower courts had to consider factual questions such as the following: Are tank vessels used in the Alaska

trade already constructed in such a way that compliance with the Alaska law is physically possible without redesigning and retrofitting? What shore-based facilities are available in what locations, and are they adequate as an alternative to retrofitting vessels? Will the economics of the world-wide tanker industry react to laws like Alaska's by causing mass avoidance of local markets? By a change in present tanker design and construction? By a shift to barges or other transportation modes? Will enforcement of Alaska's law result in non-availability of onshore deballasting facilities for heavily contaminated ballast, as asserted by Chevron? Will the industry react by internal changes which frustrate the Coast Guard's overall anti-pollution strategy?

The Court of Appeals has already digested the voluminous and complex facts on these points. This Court can adopt the Court of Appeals' factual conclusion, which was that Alaska's statute will not require widespread changes in the tankard Industry. However, in order to find Chevron's assertions proper cause for reversal, this Court would need to make its own examination an analysis of these complex issues. Following that review, reversal would be appropriate only if this Court reached a conclusion contrary to that reached by the lower court. Moreover, those facts are unique to the situation of the Alaska tanker trade, making a decision in this case of little relevance to other similar cases, if others should ever arise.

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CONCLUSION

This case does not merit review by the Supreme Court: It has no far-reaching impacts, will likely become moot over time, and presents no great questions of law for resolution. We respectively request this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

NORMAN C. GORSUCH
ATTORNEY GENERAL

DOUGLAS K. MERTZ
Assistant Attorney General

Counsel for State of Alaska Respondents

November, 1984.

APPENDIX A

Alaska Statutes

AS 46.03.750

Effective until July 1, 1980

Sec. 46.03.750. Ballast water discharge. (a) No person may pollute or add to the pollution of waters of the state by discharging from any vessel ballast water, tank-cleaning waste water or other waste containing petroleum in excess of the maximum permitted by the water quality standards established under §§ 70 and 80 of this chapter and in no event may a vessel discharge ballast water, tank-cleaning waste water or other waste containing petroleum in excess of 50 parts per million of oil residue.

(b) Except as provided in (c) of this section, no vessel may take on petroleum or any petroleum product or by-product as cargo unless it arrives in ports in the state without having discharged ballast at sea during the period of time from departure of the vessel enroute to the state from a port outside the state to arrival at a port in the state or while in transit between ports in the state, and the master of the vessel certifies the fact on forms provided by the department.

(c) Vessels equipped with tanks used exclusively for ballast or capable of producing ballast with an oil content less than that provided for in (a) of this section may discharge that ballast at sea, including the waters of the state, if it meets the standards of (a) of this section and the master of the vessel certifies that fact on forms provided by the department.

(d) Repealed by § 19 ch 220 SLA 1976.

(e) Cargo in tank vessels, as defined in AS 30.20.060(9), engaged in the marine transportation of

crude oil, refined petroleum products or their by-products may not be placed in segregated ballast tanks, nor may ballast be placed in cargo tanks of those tank vessels having segregated ballast systems. However, the department may by regulation permit the placing of ballast in the cargo tanks of those vessels in emergency situations. All ballast placed in cargo tanks shall be processed by or in an onshore ballast water treatment facility and may not be discharged into the waters of the state. (§ 3 ch 120 SLA 1971; am § 19 ch 220 SLA 1976; am § 3 ch 266 SLA 1976)

AS 46.03.750(a)(b)
Effective after July 1, 1980

Sec. 46.03.750. Ballast water discharge. (a) Except as provided in (b) of this section, a person may not cause or permit the discharge of ballast water from a cargo tank of a tank vessel into the waters of the state. A tank vessel may not take on petroleum or a petroleum product or by-product as cargo unless it arrives in ports in the state without having discharged ballast from cargo tanks into the waters of the state and the master of the vessel certifies that fact on forms provided by the department.

(b) The master of a tank vessel may discharge ballast water from a cargo tank of his tank vessel if it is necessary for the safety of the tank vessel and no alternative action is feasible to assure the safety of the tank vessel. (§ 3 ch 120 SLA 1971; am § 19 ch 220 SLA 1976; am § 3 ch 266 SLA 1976; am § 3 ch 116 SLA 1980)

United States Code
33 U.S.C. § 1321(o)

(o) *Obligation for damages unaffected; local authority not preempted; existing Federal authority not modified*

or affected. (1) Nothing in this section shall affect or modify in any way the obligations of any owner or operator of any vessel, or of any owner or operator of any onshore facility or offshore facility to any person or agency under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil or hazardous substance or from the removal of any such oil or hazardous substance.

(2) Nothing in this section shall be construed as preempting any State or political subdivision thereof from imposing any requirement or liability with respect to the discharge of oil or hazardous substance into any waters within such State.

(3) Nothing in this section shall be construed as affecting or modifying any other existing authority of any Federal department, agency, or instrumentality, relative to onshore or offshore facilities under this Act or any other provision of law, or to affect any State or local law not in conflict with this section.

33 U.S.C. Section 1370

§ 1370. State authority.

Except as expressly provided in this Act, nothing in this Act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or

political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

(June 30, 1948, ch. 758, Title V, § 510, as added, Oct. 18, 1972, P. L. 92-500, § 2, 86 Stat. 893.)

APPENDIX B

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

June 18, 1984

Richard E. Sherwood, Esq.
Charles P. Diamond, Esq.
400 South Hope Street
Los Angeles, California 90071

RE: Chevron U.S.A., Inc., et al. v. Jay S. Hammond
No. —

Gentlemen:

The Court today entered the following order in the above-entitled case:

"The motion to direct the Clerk to file a petition for writ of certiorari, out-of-time, is denied."

Your check in the amount of $200.00 is returned. Copies of your petition for certiorari are being returned under separate cover.

Very truly yours,

ALEXANDER L. STEVAS, Clerk
By
Francis J. Lorson
Chief Deputy Clerk

Enc.

cc: Counsel of record
Honorable Rex E. Lee,
Solicitor General